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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1434

MOBIL OIL CORPORATION, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Mobil Oil Corporation (Mobil) prays that a writ of *certiorari* issue to review the *en banc* judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 23, 1977. The United States District Court for the District of Columbia, acting pursuant to § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49,

granted enforcement of six of twelve specifications in a Federal Trade Commission (FTC) subpoena directed to Mobil.[1] The district court limited production pursuant to the remaining six specifications to data relevant to the FTC's stated purpose in conducting its investigation. A unanimous panel of the court of appeals affirmed, with minor modifications. Upon rehearing *en banc,* a diminished majority of the court[2] enforced the subpoena as originally issued, except for certain modifications resulting from negotiations ordered by the court.

OPINIONS BELOW

The February 23, 1977 *en banc* opinion of the court of appeals, including the ninety-six page dissenting opinion, is not yet officially reported. It is reproduced in the joint appendix at A. 1-164.[3] The August 8, 1975 unanimous opinion of the panel is reported at 517 F.2d 137; it is also reproduced in the joint appendix at A. 209-37. The opinion of the district court is set forth as an appendix to the *en banc* decision of the court of appeals and is reproduced in the joint appendix at A. 56-61.

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[1] Identical subpoenas were directed to Exxon Corporation, Shell Oil Company, Standard Oil Company (Indiana), Standard Oil Company of California, The Superior Oil Company and Texaco Inc., all of which were co-respondents in the district court and co-appellees in the court of appeals. Certain of those parties have filed separate petitions for *certiorari,* presenting various questions for review. In addition to the questions presented in this separate petition. Mobil also joins in urging review of the questions presented by those other petitions.

[2] Three of the nine judges of the court recused themselves; the remaining six members split four-to-two.

[3] The dissenting opinion is set forth in the joint appendix at A. 69-164.

JURISDICTION

The *en banc* opinion of the court of appeals was entered on February 23, 1977. The time for filing this petition for a writ of *certiorari* does not expire until May 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the unprecedented test articulated by the court of appeals for determining the relevancy of an agency's investigative subpoenas is so permissive and unlimited as to repudiate established law and to fall below the minimum definitional standards required by the Fourth Amendment.

2. Whether the federal courts are required to, as a matter of law, or properly can, ignore an agency's explicit official statements as to the purpose of its investigation, when the resolution authorizing the investigation is so broad as to provide no adequate basis for determining relevancy.

STATUTES INVOLVED

This case involves the enforceability of an FTC subpoena *duces tecum* issued pursuant to § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. That section is reproduced as an appendix to this petition.

STATEMENT OF THE CASE

A. Background

The Federal Power Commission (FPC) establishes rates for the sale of natural gas for resale in interstate commerce based, in part, upon the supply of "proved" natural gas reserves, as reported by the American Gas

Association (AGA).[4] Proved reserves are those whose existence has been established by exploratory drilling. AGA, an association of natural gas producers, compiles and publishes statistics on proved reserves (and *only* proved reserves) for Southern Louisiana and other areas of the country based upon data obtained from public sources and made available by individual companies.

Mobil was not represented on the AGA subcommittee responsible for computing proved reserves for Southern Louisiana, and no Mobil personnel provided information to that subcommittee during the time period covered by the subpoena. (A. 302).

The AGA proved reserve total for Southern Louisiana declined significantly in 1969. Amid allegations that gas producers were underreporting their proved reserves for that area to the AGA in order to influence gas prices set by the FPC, the late Senator Hart, Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, wrote to then Commissioner McIntyre of the FTC, asking that the Trade Commission conduct an investigation. Accordingly, on June 5, 1971 the FTC issued a resolution instituting the instant investigation. (A. 287).

That resolution purports to authorize an inquiry to determine whether a company is

> "engaged in conduct or activities relating to the exploration and development, production, or mar-

---

[4] The accepted technical definition of proved reserves is set forth at A. 5, n. 2. Gas reserves also may be denominated as "speculative", "possible", "probable", "recoverable", or "ultimately recoverable", but there is no consistently accepted use or definition of those terms in the industry. Only proved reserves are consistently defined in the industry, and only proved reserves are reported by the AGA.

> keting of natural gas, petroleum, and petroleum products, and other fossil fuels in violation of Section 5 of the Federal Trade Commission Act." *Id.*

The resolution thus purports to authorize an investigation into every conceivable business activity in which Mobil Oil Corp. engages relating to petroleum and/or other fossil fuels. By its terms, the resolution applies to the coal and crude oil industries as well as to the natural gas industry. And it applies to every aspect of these separate industries—exploration, production and marketing — without limitation. Furthermore, there is no limitation on the legal purpose of the investigation other than whatever guidance may be derived from the unsettled boundaries of § 5. *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

In a June 1973 submission to Senator Hart, the FTC officially explained its actual purpose:

> "The theory of the investigation is to compare the reserve estimates used by the companies in their internal purposes with the estimates submitted to the American Gas Association that were relied upon by the Federal Power Commission [in setting an area-wide rate for Southern Louisiana]." (A. 96-97).

That statement of purpose was repeated almost verbatim by James T. Halverson, Director of the FTC's Bureau of Competition, in his June 27, 1973 testimony before Senator Hart's subcommittee. (A. 97, n.47).

B. The Subpoenas

In the course of the FTC investigation, Mobil and ten other producers received identical subpoenas *duces tecum* demanding production of a multitude of documents pursuant to twelve specifications, designated A-L.

Several of the specifications require documents unrelated to proved reserves. Thus, specification G [5] demands documents and underlying data relating to *all* Southern Louisiana reserve estimates—not just proved reserve estimates—formulated by the producers, both for internal purposes and for reports to the AGA, during the period 1962-1970. Specification H requires the production of technical data concerning the locations, operations, ownership interests, and drilling status of the fields and leaseholds for which estimates are provided pursuant to specification G, while specification I (1) and I(5) demand correspondence and other documents concerning those estimates. Finally, specification I(3) requires what are generally termed "bid files", [6] relating to Offshore Southern Louisiana.[7]

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[5] Specifications A through F demand background information relating to each company's officers, parent corporations, subsidiaries, annual reports and customers, as well as net production and sales volumes statistics for certain years. (A. 50-51). The enforcement of those specifications was not challenged by the companies on appeal, and they are not in issue here.

[6] Though all documents unrelated to proved reserves are equally irrelevant to the stated purpose for the FTC's investigation, Mobil's primary concern has always centered on the bid files, for reasons which are set forth in the text that follows. Consequently, this petition focuses on the impropriety of requiring production of bid files.

[7] Certain documents made available to the AGA are called for by specification I(2), and specification I(4) requires the production of reports or studies concerning "dedicated" reserves. Specification J seeks documents relating to failures, delays in or changes in petitioner's reporting of proved reserves to the AGA. Documents discussing the relationship between the amount of proved reserves and the FPC's pricing policies are called for by specification K. The last specification, L, asks for the names of petitioner's employees who assisted in the reporting of gas reserves for the AGA and for other organizations. (A. 53-55).

C. Bid Files

Mobil's bid files contain documents and data used by Mobil in nominating and bidding on tracts put up for lease by the federal government. (A. 297). Included are geological and geophysical data which are analyzed in determining the probability of, and the possible extent of, gas deposits underlying undrilled tracts. *Id.* Bid files also contain documents which would disclose Mobil's bidding methodology—*i.e.*, the manner in which Mobil evaluates the scientific and other data compiled on each tract and determines how much to bid for each lease. (A. 294-95, 297). If Mobil's competitors were aware of its bidding methodology, they could forecast how much Mobil would bid on each tract and, thereby, prevent its bid from being successful by bidding just above them. (A. 292, 300). That would injure the public as well as Mobil, since it would enable Mobil's competitors to bid less than they would in a truly competitive situation. And it would reduce the amount collected by the federal government.

Uncontroverted evidence establishes that bidding methodologies "differ from company to company and are the most closely guarded secrets in the oil business —perhaps in all of American business." (A. 294). Access to such materials maintained by Mobil is restricted to "a handful of executives." (A. 295). The speculative reserve figures and underlying documents for a bid usually are in handwriting to limit exposure to clerical personnel and are kept in a bank safe deposit box or in Mobil's vault. (A. 299).

There is a clear dichotomy between pre-drilling and post-drilling reserve estimates. (A. 300). The speculative reserve estimates in the bid files, made before any

drilling, are based only on raw geological and geophysical data and "are often grossly inaccurate." (A. 299). The bid file data are used only until the time of the bid and "are of no further use" thereafter. (A. 298; *see also* A. 293, 300). Once a tract is leased and the first well is drilled, "proved" reserves are established. (A. 299). "Proved" estimates are based on core samples and other concrete data obtained by actual drilling. "Thus to suggest that [bid file data] should be compared to proved estimates to see if there has been under-reporting is absurd." (A. 299). As the dissent pointed out (A. 116), the FTC offered no scientific or expert evidence to dispute the irrelevancy of bid files to proved reserves.

D. Proceedings Before the FTC

Mobil approached the FTC and, after extensive negotiations, offered voluntarily to provide virtually all of the data demanded by the subpoena, except for bid file data. Mobil did so on the condition that the FTC would agree to protect the confidentiality of sensitive documents by providing reasonable notice of its intent to release such documents so as to allow Mobil to seek judicial review. (A. 316-35).

The FTC refused to accept Mobil's offer, and the compliance negotiations ended. Mobil's subsequent motion to quash the subpoena was denied by the FTC, and it thereafter initiated enforcement proceedings in the district court.

E. Proceedings Before the District Court

The district court was obviously concerned with the lack of specificity in the resolution. At a hearing on the merits of the FTC's petition for enforcement, the

following exchange took place between FTC counsel, Mr. Harwood, and the district court:

> "THE COURT: Wait a minute.
>
> You are trying to prove that [petitioners] conspired together to make certain returns with regard to reserves that were incorrect, aren't you? Is that what you are trying to say?
>
> "MR. HARWOOD: That was one of the subjects we are investigating, yes.
>
> "THE COURT: What else are you investigating?
>
> "MR. HARWOOD: Your Honor, the resolution states that we are engaged—
>
> "THE COURT: *Don't tell me what the resolution says. Tell me what you are trying to do. I don't understand the resolution.*" (A. 94-95, n. 44) (emphasis added).

At another point in the hearing, FTC counsel summarized the purpose of the agency's investigation in terms indistinguishable from those used by the Commission itself in responding to Senator Hart:

> "[MR. HARWOOD]: When I said that we want to find out whether or not there is a shortage, I misstated myself. What we want to find out is whether or not *in reporting natural gas reserves* there has been collusive conduct in the way these estimates are prepared.
>
> "THE COURT: Reporting them to whom.
>
> "MR. HARWOOD: All right. *Reporting them to the American Gas Association*, because the American Gas Association data is the only available published data on these reserves." (A. 96) (emphasis added).

Based upon these representations, the district court held that "the bid files, the estimated unproved and unverified estimates, represented by the bid files are in no way relevant *to the investigation or inquiry that you tell me you are making* . . . ." (A. 110) (emphasis added).

The district court enforced specifications A-F in full; specifications G-L were enforced in a modified manner consistent with the FTC's stated purpose—*i.e.*, to investigate the reporting of proved reserve data to the AGA. More specifically, documents unrelated to proved reserves were excluded. Production of proved reserve documents was limited to a random sample of 100 of the approximately 220 fields involved, on the ground that data from 100 fields would be sufficient for the FTC to determine whether or not the companies' reporting of proved reserves data to the AGA during the years in question violated § 5 of the FTC Act. Certain confidentiality provisions also were imposed.

F. Proceedings Before the Court of Appeals

A unanimous panel of the court of appeals affirmed the district court, concluding that it had not erred in measuring the relevance of the subpoenaed documents against the FTC's stated purpose. The panel found three separate grounds for affirming the district court: relevance (A. 228), burden (A. 231), and administrative collateral estoppel (A. 223).

Upon rehearing, *en banc*, a diminished majority of the court reversed the district court and enforced the subpoena as issued, except for modifications resulting from negotiations ordered by the court of appeals.

The majority opinion specifically held the bid file materials to be relevant, concluding that the district court had erred in looking beyond the resolution and measuring relevancy against the FTC's specific statements of purpose. (A. 26). Relevance and burden, the majority opined, must be measured "*only* against the general purposes of [the FTC's] investigation." (A. 21-22) (emphasis added).

The majority went on to explain that the district court had erroneously accepted, at the instance of the companies, a mistaken characterization of the purpose of the inquiry—*i.e.*, that the FTC is investigating possible § 5 violations in the reporting of proved reserves to the AGA. (A. 22). In the pre-complaint stage, it stated, "an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case." (A. 21) (emphasis in original). Even where (as here) the agency voluntarily defines the true focus of its investigation—in official statements by the agency and through counsel—a court must ignore those statements in determining relevancy.

The majority characterized the district court's reliance upon the agency's official statements and upon the representations made to it by FTC counsel as an error of law and asserted "the authority—and the duty—" to set aside the district court's relevancy determinations as "erroneous"[8] "without limitation

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[8] The majority asserted the right to set aside "for mere error" (A. 39) the district court's decision to limit the subpoena on the ground of undue burden. *See also* A. 42, where the majority reversed as "unwarranted" the district court's holding that the FTC must inspect the documents at points outside Washingon, D.C., because of their volume.

by the doctrines of 'clearly erroneous' and 'abuse of discretion' that are applicable to review of factual determinations." (A. 25-26 and n. 29). The majority also rejected the district court's reliance upon collateral estoppel, concluding that it constitutes a substantive defense which may not be raised in an enforcement proceeding. (A. 32).[9]

The two dissenting judges concluded that the majority was incorrect in reviewing the district court's holding on relevancy for error, without finding an abuse of discretion. (A. 104-05). They reiterated the conclusion of their panel opinion that three *separate* grounds support the district court—relevance, burden, and administrative collateral estoppel. (A. 81, 131-32). Regarding relevance, the dissenters wrote:

> "The most astonishing point about the majority opinion's discussion of 'relevance' is that nowhere therein does it define the FTC's 'purpose' in the investigation, nor does it purport to employ a standard of appellate review which is legally definable.
>
> 'Relevance' simply cannot be determined in the absence of defined 'purpose' . . .". (A. 93).

And on the bid file question, the dissent spent nearly sixteen full pages meticulously refuting the relevance of the unsubstantiated reserve estimates and bidding methodology documents in those files (A. 105-20).

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[9] The random sample limitation was reversed because, the majority asserted, it rested largely upon the district court's collateral estoppel ground. (A. 41). And the confidentiality restrictions imposed by the district court were lifted as premature until the FTC has had an opportunity to rule on specific requests for confidential treatment. (A. 43).

REASONS FOR GRANTING THE WRIT

THE HOLDING OF THE COURT BELOW ON RELEVANCY IS UNPRECEDENTED; IT READS OUT OF THE LAW THE ESTABLISHED PRINCIPLE THAT AGENCY SUBPOENAS MAY REQUIRE ONLY RELEVANT DOCUMENTS AND VIOLATES THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The court of appeals' holding that, as a matter of law, it must weigh relevancy against the agency's general statements of purpose, wholly ignoring subsequent voluntary statements particularizing that purpose, is unprecedented. Moreover, as illustrated by the expansive and undefined breadth of the general statement of purpose in this case, that holding reads the relevancy requirement out of the law and, therefore, effectively precludes application of the Fourth Amendment to unreasonable administrative subpoenas. The significance of the court of appeals' holding thus transcends the relatively narrow confines of the present case. By effectively removing the most significant remaining safeguard against expansive agency data demands, that opinion lays bare the private files of American businesses to any generalized document demand which federal agency staffs care to promulgate.

A. The Court of Appeals' Holding that FTC's Explicit Statements of Purpose Must Be Ignored Is Unprecedented and Improper.

The FTC's authorizing resolution imposes no meaningful parameters on the agency's investigation. However, in official agency statements during June of 1973, the FTC specified, with some particularity, the purpose of its investigation:

> "To compare the reserve estimates used by the companies in their internal purposes with the

> estimates submitted to the American Gas Association that were relied upon by the Federal Power Commission". (A. 96).

That statement of purpose was repeated by the Director of the Bureau of Competition later in the same month. At the district court hearings in this case, the statement was again repeated by counsel for the FTC who stated, in response to questions from the court, that the objective of the Commission's investigation is to find out whether or not in "reporting them [natural gas reserves] to the American Gas Association" there has been "collusive conduct". *Id.*

There can be no reasonable question that Mobil's bid files, containing only speculative reserve estimates (prepared before any drilling on a tract and never reported to anyone), are wholly irrelevant to the only comprehensible statements of the FTC's purpose—*i.e.*, those set forth by the FTC itself, by the Director of its Bureau of Competition, and by FTC counsel. The district court explicitly so found: "[T]he bid files, the estimated unproved and unverified estimates, represented by the bid files are in no way relevant to the investigation or inquiry that you tell me you are making . . . ." (A. 110).

The court of appeals did not hold that that finding constituted an abuse of discretion or that it was unsupported by the evidence; no such conclusion is permitted by the record. What the court held was that the finding was erroneous *as a matter of law*. What the court held was that, as a matter of law, the district court was required to *ignore* the agency's own statements of its purpose in conducting this investigation and measure the relevancy of the documents sought against a vague

and essentially meaningless resolution, even though many of those documents are clearly and obviously irrelevant to the actual purpose of the FTC's investigation.

That holding is absolutely unprecedented, finding support neither in the previous decisions of this Court [10] nor in the relevant lower court decisions.[11]

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[10] Both Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), primarily involved the jurisdictional reach of the respective statutes. In Oklahoma Press the relevancy of the requested data was not directly challenged, 327 U.S. at 195-96; in Endicott Johnson the information sought was clearly relevant to the issue under investigation, 317 U.S. at 508. In United States v. Morton Salt Co., 338 U.S. 632 (1950), no specific objections were raised to the relevancy of the FTC's information demands. *Id.* at 653. In CAB v. Hermann, 353 U.S. 322 (1957), this Court merely noted that the district court had ordered the production of "relevant" documents. *Id.* at 323. Finally, in United States v. Powell, 379 U.S. 48 (1964), there was no question that the tax data sought by the Internal Revenue Service were relevant to the Service's stated purpose for summoning the president of a corporate taxpayer to testify—*i.e.*, to determine whether or not two of the taxpayers' previous returns were fraudulent. *Id.* at 49-50.

[11] *See, e.g.*, Moore Business Forms, Inc. v. FTC, 307 F.2d 188, 189 (D.C. Cir. 1962), and Adams v. FTC, 206 F.2d 861, 867 (8th Cir. 1961), where the subpoenas at issue were measured against specific complaints issued by the FTC; *see also* FTC v. Green, 252 F. Supp. 153, 156 (S.D. N.Y. 1966), and Westside Ford, Inc. v. United States, 206 F.2d 627, 632 (9th Cir. 1953), where, as the majority below recognized (A. 21, n. 24), the courts merely concluded that the relevancy standard is lower in investigative proceedings than in adjudicative proceedings, without establishing any procedure for measuring relevancy. The FTC data demand in Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971), was designed to determine whether the company had made illegal acquisitions and corporate mergers. In enforcing the contested portions of the data demand, the court of appeals merely noted

On the contrary, a number of decisions of this court and of lower federal courts strongly suggest that the court of appeals erred in ignoring the clear statements by the FTC and its counsel of their actual purpose.

The law is clear that an administrative agency is bound by its own statements, if disregarding such statements threatens injustice. *Moser* v. *United States,* 341 U.S. 41 (1951); *United States* v. *Wharton,* 514 F.2d 406 (9th Cir. 1975); *Fox* v. *Morton,* 505 F.2d 254 (9th Cir. 1974); *Emeco Industries, Inc.* v. *United States,* 485 F.2d 652 (Ct. Cl. 1973); *Gestuvo* v. *District Director, INS,* 337 F. Supp. 1093 (C.D. Ga. 1971). *See also United States* v. *Star Construction Co.,* 186 F.2d 666, 669 (10th Cir. 1951); Davis, Administrative Law of the Seventies §§ 17.01-.03 (1976). Disregarding the FTC's only meaningful statements of purpose here threatens Mobil with the injustice (and burden) of being unreasonably required to provide boxes and boxes of irrelevant materials.

The circumstances surrounding Senator Hart's request for an investigation, and the FTC's own descriptions of what it is investigating, were neither fabricated nor distorted by Mobil; the FTC voluntarily explained its purpose on several occasions both to Congress and to the district court. The district court specificially found that the bid file data are irrelevant to that purpose.

Even the majority of the court of appeals explicitly recognized that "[o]nly proved reserves are consist-

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that they clearly focused on the issue under investigation—*i.e.,* the relationship between the company and its jobbers and suppliers. *Id.* at 1391. And in Pacific Westbound Conference v. United States, 332 F.2d 49, 52 (9th Cir. 1964), the court was able to weigh the relevance of the agency data demand against a very specific statement of purpose.

ently defined and only proved reserves are reported by the AGA." (A. 5-6, n. 2). Likewise, the majority conceded that the speculative reserve data in the bid files are (1) quickly superceded; (2) not used to compute proved reserve figures; and (3) often completely erroneous in terms of predicting the volume of gas, if any, to be found once drilling begins. (A. 27).

To hold, in these circumstances, that the bid file data are nonetheless relevant to the FTC's inquiry renders the district court's obligation to determine relevance an empty formality. In effect, the court's holding reads the relevancy test out of the law and, as we demonstrate below, violates the Fourth Amendment. Since all constitutional issues could have been readily avoided by giving effect to the agency's own statements of purpose, the court of appeals erred in failing to do so. *CAB* v. *United Airlines,* 542 F.2d 394, 399 (7th Cir. 1976).

B. The Court of Appeals Holding that Relevancy Must Be Determined by Reference Only to the Resolution Reads the Relevancy Requirement Out of the Law and Makes the Constitutional Limitations of the Fourth Amendment Meaningless.

The vice of the court of appeals' determination to ignore the FTC's explicit statements of purpose is that relevancy then must be measured only against the FTC's authorizing resolution. But that resolution is so broad and so vague as to lack meaning. As Judge Hart so pithily stated below: "Don't tell me what the resolution says. Tell me what you are trying to do. I don't understand the resolution." (A. 26-27, n. 44).

The resolution literally authorizes the FTC to investigate every aspect of Mobil Oil's business to ferret out unspecified possible violations of § 5. (*See* pp. 4-5,

supra). It is thus so broad as to constitute precisely the kind of constitutionally impermissible general warrant which this Court has condemned in the past. *See FTC* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924).

The Court has never explicitly defined the procedures for weighing and determining the relevancy of investigative data demands by federal agencies. But it has made clear that relevancy is a requirement mandated by the Fourth Amendment. *Oklahoma Press, supra,* 327 U.S. at 209.

Moreover, the Court has defined the outer parameters of the relevancy requirement. Thus, in enforcing the subpoenas challenged in *Oklahoma Press,* the court distinguished investigations which are so broad and so indefinite that they effectively authorize issuance of a "general warrant". 327 U.S. at 207. Specifically discussing *American Tobacco Co.,* the *Oklahoma Press* Court found that the "aggravating circumstance" in that case was

> "the [FTC's] claim of 'an unlimited right of access to the respondents' papers with reference to the possible existence of 'practices in violation of section 5 [of the FTC Act.]' " *Id.* at 207, n. 40, quoting *American Tobacco, supra,* 264 U.S. at 305; *cf. Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920).

The FTC data demand in *American Tobacco* was also cited by this Court in *Morton Salt* as an illustration of a demand so "sweeping" and so "unrelated" to the matter under inquiry as to exceed the FTC's investigatory power. 338 U.S. at 652.

The continued vitality of Fourth Amendment protection against overreaching agency data demands is demonstrated by the Seventh Circuit's very recent opinion in *CAB* v. *United Airlines, supra.* There the court of appeals reiterated this Court's holding in *Oklahoma Press* that the applicable counterpart of the Fourth Amendment probable cause standard is the requirement that documents sought in an agency investigation must be relevant to the inquiry being conducted. 542 F.2d at 398-99. The CAB asserted the right to inspect several broad categories of United's records at a given location without specifying the particular subject of its investigation. The court of appeals upheld the district court's refusal to enforce such access on the ground that, without a sufficiently comprehensible statement of purpose, no determination of relevancy was possible. 542 F.2d at 402-03.

As this court explained in *American Tobacco, supra:* "A ground must be laid [for an investigation], and the ground . . . must be reasonable". 264 U.S. at 306. The dissenters below echoed these sentiments:

> " 'Relevance' simply cannot be determined in the absence of defined 'purpose' . . . . [P]urpose in some degree must be defined in order that notice be given and relevance thereafter may be assessed." (A. 93).

Once the purpose is properly stated, relevancy must be measured against it. As this Court put it in *Oklahoma Press, supra:*

> "Relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." 327 U.S. at 209.

It is obvious, too, that a proper statement of purpose against which to measure relevancy must be sufficiently specific as to be meaningful. That obligation

> "is of course not satisfied by the recital that the purpose of the investigation is to determine compliance with the law. The same could be said for any general warrant. *Cf. Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. at 207, n. 40." *CAB* v. *United Airlines, Inc., supra,* 542 F.2d at 402-03.

Indeed, the court below reached that very conclusion in two previous cases. *See Hellenic Lines Ltd.* v. *FMB*, 295 F.2d 138 (D.C. Cir. 1961), and *Montship Lines, Ltd.* v. *FMB*, 295 F.2d 147 (D.C. Cir. 1961). In those cases, in an opinion by Chief Judge (then Judge) Bazelon, the court of appeals correctly refused to enforce the Federal Maritime Board's demands for data on the ground that the relevance of the information (and, therefore, the reasonableness of the data demands) could not be determined in the absence of a sufficient statement of the inquiry's purpose and scope. 295 F.2d at 155; *id.* at 140.[12]

In writing the majority opinion below, however, Chief Judge Bazelon brushed aside those previous holdings and fashioned a new and radically different test of relevancy: "[I]t suffices to dispose of this case that

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[12] The FTC's resolution at issue here is no more specific than the Federal Maritime Board's statement of purpose in Hellenic Lines:

> "That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, records, rates, charges and memoranda of facts and transactions hereinafter described . . . ." 295 F.2d at 140.

the material sought by the FTC is 'reasonably relevant' to *a permissible FTC purpose.*" (A. 20-21, n. 23) (emphasis added). As the dissent observed:

> "The most astonishing point about the majority opinion's discussion of 'relevance' is that nowhere therein does it define the FTC's 'purpose' in the investigation, nor does it purport to employ a standard of appellate review which is legally definable." (A. 93).[13]

The necessity for requiring a meaningful statement of purpose against which the relevancy of agency data requests can be measured was highlighed in *Watkins* v. *United States,* 354 U.S. 178 (1957). Congressional witnesses are required by statute to answer questions "pertinent to" the issue under inquiry. 2 U.S.C. § 192. When called before a House subcommittee for questioning, Watkins refused to answer certain questions on the ground that they did not meet that statutory standard. He was subsequently convicted of violating § 192, and the court of appeals affirmed.

This Court reversed Watkins' conviction on the ground that the resolution authorizing the subcommittee's inquiry lacked sufficient clarity. The *Watkins*

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[13] A previous opinion of the D.C. Circuit, Burlington Northern, Inc. v. ICC, 462 F.2d 280 (D.C. Cir.), *rehear'g en banc denied by an equally divided court,* 462 F.2d 288 (D.C. Cir.) (per curiam), *cert. denied,* 409 U.S. 891 (1972) (which was participated in by two of the judges who recused themselves below) and Judge Leventhal's separate statement as to why he would grant rehearing *en-banc* in that case (which was joined in by the author of the opinion below and by the other two concurring judges) indicates that the disagreement in the court below over the permissible reach of agency data demands has a long history.

resolution [14] was no broader than that which the FTC cites as its authority in this matter. Yet this Court observed that "[i]t would be difficult to imagine a less explicit authorizing resolution." *Id.* at 202. The Court therefore refused to engage in a process of "retroactive rationalization"—*i.e.,* upholding the Committee's actions unless it appeared that they clearly were *not* authorized by the resolution. *Id.* at 204; *see also United States* v. *Rumely,* 345 U.S. 41 (1953).

If *Watkins* requires that the purpose of the investigation be spelled out by Congress before a Congressional committee can validly issue subpoenas, "even more must this be spelled out in the case of administrative agencies acting under a grant of power from Congress." *FCC* v. *Cohn,* 154 F. Supp. 899, 908 (S.D. N.Y. 1957). Yet the FTC argued, and the court below agreed in essence (A. 22-23, n. 23, 27), that the retroactive rationalization condemned in *Watkins* is appropriate in this case.

The concern expressed in *Watkins* was reiterated in *United States* v. *Powell, supra:* "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be

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[14] The resolution defined the authority of the House Un-American Activities Committee as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 354 U.S. at 201-02.

abused." 379 U.S. at 58. Thus, an inquiry into the "underlying reasons" for agency data demands is appropriate. *Id.; see also CAB* v. *United Airlines, supra,* 542 F.2d at 402.

The court of appeals' refusal to countenance such an inquiry required it to measure relevancy against a resolution so broad that it supplies no standard whatever for that determination. The holding of the majority thus eviscerates the constitutional relevancy requirement.

Virtually every federal administrative agency has broadly worded powers of investigation.[15] The only check on the unbridled and unreasonable exercise of those powers has been the relevancy requirement imposed by the Fourth Amendment. The majority's opinion, however, abrogates the Fourth Amendment protections by giving administrative agencies *carte blanche* to issue subpoenas without regard to whether or not the data requested is relevant to the actual purpose of the agency's inquiry.

C. A Higher Standard of Relevance Is Applicable When (as Here) Highly Sensitive Data Are Subpoenaed.

The only evidence before the district court conclusively demonstrates that Mobil's entire bid files are considered "strictly confidential" and that they represent the expenditure of millions of dollars in development costs. (A. 299). The bidding methodologies and reserve data contained in those files are "trade secrets". *Id.* The bid file documents are kept in safe deposit boxes or in Mobil's vault and access within the company is "severely limited" to executives. *Id.*

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[15] *See, e.g.,* 15 U.S.C. § 717m(c) (FPC); 15 U.S.C. § 772(e)(1) (FEA); 46 U.S.C. § 1124(a) (FMC); 47 U.S.C. § 409(e) (FCC); 49 U.S.C. § 12(1) (ICC); 49 U.S.C. § 1354(c) (FAA).

This secrecy is necessitated by the intensely competitive nature of bidding for offshore natural gas leases. (A. 299-300).

As the dissent noted (A. 125-26, n. 105) when such highly sensitive, confidential data is involved, a higher showing of relevance is required. *See Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324, 330 (9th Cir. 1961); *United States* v. *Serta Associates Inc.*, 29 *FRD* 136, 138 (N.D. Ill. 1961); *Zenith Radio Corp.* v. *RCA*, 106 F. Supp. 561, 565 n. 6 (D. Del. 1952). The FTC has so recognized in the past. *Seeburg Corp.*, 70 F.T.C. 1809, 1813 (1966); *Puget Sound Salmon Canners, Inc.*, 53 F.T.C. 342, 353 (1956); *Maico Co., Inc.*, 51 F.T.C. 1197, 1203 (1955). More recently, the FTC has affirmed an Administrative Law Judge's decision that a strong showing of the FTC's need for confidential documents must be established before the production will be required. *British Oxygen Co., Ltd.*, FTC Docket 8955 (April 23, 1974), *aff'd* 83 F.T.C. 1758 (FTC 1974).[16]

It is well established that the Fifth Amendment "forbid[s] discrimination that is 'so unjustifiable as to be violative of due process.' " *Schneider* v. *Rusk*,

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[16] Additionally no person employed by or affiliated with Mobil supplied data to the AGA during the time period covered by the subpoena. (A. 302). Obviously, therefore, Mobil had no means of participating in any wrongful under-reporting that may have occurred, and could not be a target of the FTC's investigation.

Mobil's third party status clearly dictates that it be given "special protection". *See, e.g.*, Surety Ass'n of America v. Republic Ins. Co., 388 F.2d 412, 415 (2d Cir. 1967); Less v. Taber Instrument Corp., 53 FRD 645, 647 (S.D. N.Y. 1971); FCC v. Cohn, *supra*, 154 F. Supp. at 913: FTC v. Bowman, 149 F. Supp. 624 (N.D. Ill.), *aff'd* 248 F.2d 456 (7th Cir. 1957). Such special protection requires that a stronger showing of relevance be made to compel production of data from Mobil than from a gas producer which reported reserves data to the AGA, and which may, therefore, be a target of the FTC investigation.

377 U.S. 163, 168 (1964), quoting from *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). The corollary of the requirement that, under the Fifth Amendment, the federal government must provide similar treatment for those similarly situated, *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), is that it must recognize distinctions between those in significantly different circumstances. It is just as much discrimination to treat people in unequal situations equally as it is to treat people in equal situations unequally. In failing to recognize the special situation created by the demand for Mobil's bid files, the opinion below makes a mockery of that principle.

CONCLUSION

For the reasons stated above, a writ of *certiorari* should be issued to review the *en banc* decision of the court of appeals.

Respectfully submitted,

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